No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, as Receiver of Scandinavian-American Building Company, a corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al, *Appellees*,

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BEN OLSON COMPANY, a Corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, et al, *Appellees*,

RECEIVER'S ANSWERING BRIEF TO BRIEF OF BEN OLSON COMPANY, APPELLANT

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RECEIVER'S ANSWERING BRIEF TO BRIEF OF BEN OLSON COMPANY, APPELLANT

This appellant, the Ben Olson Company, filed a lien against the property of the Scandinavian American Building Company for $41,666.32, and in this action seeks a foreclosure thereof.

In order to make this action more interesting the appellant also desires to sue in this action, its co-defendant, the Supervisor of Banking, to establish its claim for damages as against the assets of the defunct Scandinavian American Bank of Tacoma, in

his hands for liquidation and distribution in the sum of $8,029.77.

The contract which the appellant signed was in writing and was made with the building company, it recited therein that the building company owned the property in question, and was engaged in the erection of a building thereon, the appellant filed its lien against the Building Company and sued the Building Company in this action, but the appellant now takes the position that there was no such corporation as the building company and that the bank in fact owned the real property and was erecting the building and that no estoppel arises out of the written terms of the contract. If this be true in fact and in law, this whole action must fail except as to this appellant, as the Supervisor may not be sued unless a claim be first presented to him and rejected by him; and under the Washington Lien Statutes the other lien claimants would have no lien because they failed to file same as against the Bank. If that be true also, the action of the Court in appointing this respondent as receiver is illegal, in that, under the terms of the Washington Statute no receiver may be appointed to take charge of the assets of an insolvent Bank. The contract which the appellant signed contained a clause expressly waiving appellants right to a lien, and the appellant's lien and proof all go to the contract price and not to the reasonable value of the material furnished; appellant claims the

right to repudiate that one clause of the contract without rescinding the contract, notwithstanding that clause which absolutely bars this action under the contract.

We submit that the learned counsel for appellant has not violated the elementary principles of law suggested by the statements which we have made, through any misconception as to the law, but in an endeavor to distract attention from the unjust and inequitable claims of his client. Many of the statements of fact made in the brief find absolutely no support in the evidence.

Merely to illustrate what we have said, we call the Court's attention to the following misstatements contained in the Brief:

On page 19 the statement is made that Olson's estimate No. 4 "was presented but there was no approval, because the entire project was abandoned." The evidence (Tr. p. 883) "This estimate was never presented."

On page 23, the statement is made "These items are itemized in Estimate 6; they were brought to Tacoma ready for use, were billed to appellant by Crane Company, and because of their fragile character were stored by Crane Company, neither the building nor appellant having proper storage space."

The Crane Company sent the Building Company

an invoice of each shipment delivered to Olson. Under our law this is a prerequisite to the enforcement of a lien; the Crane Company did not even claim a delivery of these items to Olson, and did not even include them in their lien. The testimony (Tr. p. 897). "They were not taken to the building * * * I do not recall that we notified the building company or its representatives of the fact that these materials were here."

On the same page it is said, "The lien prayed for was $41,656.33, less whatever sum should be awarded Crane Company as a sub-contracting materialman, which turned out to be $16,047.03," failing to call attention to the fact that the Crane Company lien was reduced from $20,416.80, because of the fact that the 86 closets were not delivered. So that if appellant were entitled to a lien for these closets, Crane Company is also entitled to a lien therefor.

Upon the merits of this case, these various "estimates" put into evidence by Olson, in so far as they can be checked at all, show the inequity of Olson's claim. The Court will bear in mind that practically all of the material for which Olson claims a lien was bought from Crane Company; and although Olson Company had been paid $13,425.56 for this material, it had not paid Crane Company anything at all.

The lien claim of this appellant may be divided into materials of six classes.

The first class: the labor and material actually furnished to the building by the appellant, for which no one else was claiming a lien; this amounted to material of the value of $1,173.99 and labor of the value of $2,279.80 (Ex. 357, Tr. pp. 965-6). If the appellant was entitled only to a lien for this amount the evidence showed that it had been overpaid to the extent of $10,000.00.

The second class: the material furnished by Olson which he had gotten from Crane Company but for which he had not paid Crane Company and for which Crane Company had filed a lien which was adjudged valid and foreclosed in this action, and upon which the Court allowed Crane Company costs to the extent of $2,000.00. If the appellant was entitled to a lien for these materials at the price at which he "estimated" them, (which includes 50% profit for merely ordering them from Crane Company) and also to the labor and material mentioned in the first class, he would still be overpaid to the extent of nearly $5,000.00.

The third class: The 86 closets in Crane Company's warehouse (Estimate No. 5) for which both Crane Company and Olson filed and claimed liens but for which the Court disallowed Crane's lien except as to $1,720.00 for portions actually delivered to the building, Crane Company's balance being $4,398.90, Olson's balance being $6,132.66. On this item Olson only claimed to be entitled to a profit of 36%, and if this profit were allowed him, but

his profit on the materials mentioned on the class number two were reduced to 36%, Olson would still be overpaid, and the receiver, of course, would be entitled to the closets,—if he could get them.

The fourth class: the pumps, hose racks, valves and steam trap not itemized in the evidence, (but itemized by the appellant on page 22 of its brief,) all of which was gotten by Olson for use in the building, but which was never delivered to the building, and which Olson values under his "estimated" prices at $5,875.60. The evidence does not show how much of a profit is included in this estimated price, but assuming that to be 50%, and reducing Olson's profit on this material and all of the material above mentioned, in classes, 1, 2 and 3 to 15%, would still leave Olson indebted to the building, and the receiver, of course would also be entitled to the materials.

The fifth class: the radiator valves ordered by Olson through Godfrey Jones Company, the agents for C. A. Dunham & Company, for with Olson had agreed to pay $1593.75, but for which he was filing his lien for $2250.00, the Court found that 15% profit was a reasonable profit to be charged by Olson for ordering these goods from other parties. If Olson's profit on all of the materials be reduced to 15% in conformity to the Court's decision, this item and all of the other items above mentioned might be allowed to Olson, and he would have a lien of less than $2,000.00—and the receiver

would, of course, be entitled to the material.

The sixth class: certain lavatories, slop sinks and urinals ordered by Olson from Crane Company which were in Crane Company's warehouse, but not delivered to Olson, and not paid for by Olson, and for which the Crane Company claimed no lien.

The inequity of the Olson "lien claim" may be gained from the following comparison of values as shown by the Crane lien claim and the Olson "estimated values."

Olson Estimate	Price	Crane Lien Price (Tr. p. 937)	Profit
Estimate No. 1 (Tr. p. 875)			
Carload of pipe	$ 8,233.03	$ 5,498.01 (A 2)	$ 2,735.02
Estimate No. 2 (Tr. p. 879)			
Pipe	7,043.51	4,730.58 (A 4)	2,312.93
Estimate No. 3 (Tr. p. 881)			
Galvanized pipe	3,648.95	2,445.45 (A17)	1,203.50
Galvanized drainage fittings	2,445.45	1,433.83 (A 6)	1,011.62
	$21,350.94	$14,107.87	$ 7,263.07

So that for goods which Olson procured on the open market for $21,000.00, and which he did not pay for and for which the materialman established his lien with $2,000.00 costs added, Olson wants a lien for more than $7,000.00 profit.

The Trial Court is his decision states that he was unable to acertain just what, in figures, this claimant was claiming, and with the help of the record and the assistance of counsel's brief we are in a like situation. Every person who tries to figure this claim arrives at a different conclusion. As illustrative of this we call attention to the summary prepared by Mr. Herber as shown in Exhibit 269 at pp. 919-20 of the record which arrives at $54,081.89, while counsel in his brief, p. 46, arrives at $55,285.85, a difference of $1200.00 in favor, of course, of the Olson Company.

Eliminating from Olson's Claim the items which were never delivered and the items retaken by Olson under the Court's order, will show that even allowing Olson the 50% profit which he contends he is entitled to make for merely buying material from a wholesale house, Olson has been overpaid to the extent of nearly $5000.00. The following are the figures (Ex. 269, Tr. p. 919).

Estimates:

No. 1	Material	$ 8,387.03		
	Labor		$ 163.00	
No. 2	Material	7,764.83		
	Labor		208.00	
No. 3	Material	7,814.40		
	Labor		779.00	
No. 4	Material	665.81		
	Labor		1,129.80	
		$24,632.07	$2,279.80	
	Total			$26,911.87

Less Crane Lien allowed	$16,047.08	
Less Crane costs allowed	2,000.00	
Less cash paid Olson	12,425.56	
Less credit for old fixtures	1,000.00	
Total		$31,472.64

As we have shown, at least $7200 of this $26,-900 claim is mere profit—what the profit on the whole $26,900 claim is, is not shown by the evidence, but if the same ratio was maintained it was about $8,500.00.

The Court will notice that this computation pays Olson for all the labor actually performed by him, at his own "estimate" price.

The Court will bear in mind that the contract which Olson signed required him to furnish and install all the plumbing for the lump sum of $91,-000 and that Olson's "estimate" prices are not the

contract prices in the sense that the building company agreed to pay the sums set forth in these estimates for the materials therein specified, but the "estimate" price is the price at which Olson says he figured this material in arriving at his bid of $91,000 for the whole job (Tr. p. 888). It is elementary, therefore, that Olson can recover, if at all, not on these "estimate" prices but on the quantum meruit. What the reasonable value of this material and labor is, is a matter of pure conjecture under the evidence. It is true the cost price of a portion of it is shown by the Crane Company evidence and that would indicate that it cost Olson approximately $18,000.00, but that is as far as the evidence goes. The appellant therefore entirely failed to prove facts upon which a lien could have been established, even had he not been fully paid.

Olson claims, however, that he is entitled to a lien for 86 closets as set forth in his estimate No. 5. (Tr. p. 898.) His estimate price is $7,852.66 for the closets complete. These closets consist of four major parts, the wall closet, the flush valve, the seat and the Hurlbut Fitting. (Tr. p. 939). The Hurlbut Fitting is a piece of pipe which is set into the wall of the building as a sewer connection or drain. (Tr. p. 942.) Olson took from Crane Company one of these closets complete and the Hurlbut fittings for all of them and these were delivered to the building.

Olson put these Hurlbut Fittings in his estimate No. 3 (4th item, Tr. p. 881) at $20.00 each or for a total of $1720.00, and the Court allowed Crane Company a lien therefor at that price.

Both Crane Company and Olson filed liens for this item. (Crane Co. Exhibit "7", Tr. p. 939). The Crane Company price for the closets complete, was $6118.90. The evidence does not show why Olson dropped his profit from 50% to 36% on this item. The reasonable value of these articles is not shown except as these figures may tend to show it. But even if Olson were allowed this item together with his profit of 36% for merely ordering them from Crane Cmopany he would be entitled only to a lien for $1,571.89, and the Receiver would be entitled to receive these closets,—if he could get them—from Crane Company. In that event Olson's claim of $26,911.87 would be increased by $6,132.66 making it total $33,044.53 against which there would be the off-set of $31,472.64. But if the Court were disposed to hold that 36% was a sufficient profit to be allowed Olson for the items bought from Crane which went into the total of $26,911.87 (this Brief p. 9..) and to reduce that accordingly Olson would still be indebted to the Building Company in approximately the sum of $1500.00, and the Receiver would be entitled to these closets—if he could get them.

The Court disallowed this item except as to the one closet delivered and the Hurlbut Fittings

upon the ground that there was no delivery thereof.

Olson also claimed a lien for certain pumps, hose racks and radiator valves of the "estimated" value of $5,875.60, which are not itemized in the evidence but which counsel has itemized on page 22 of appellant's brief, and for certain urinals, lavatories and slop sinks of the "estimated" value of $12,-910.76 being a part of Estimate No. 6 (Tr. p. 900) and itemized by appellant on page 23 of its brief.

Olson also claimed a lien for $2,250.00 for raditor valves order (Tr. p. 906) from C. A. Dunham & Co., through their agents Godfrey Jones Co. at a price of $1,593.75 (Tr. p. 967) and undelivered by them to Olson but still in their possession, and unpaid for by Olson. (Tr. p. 900.)

The Court will notice that in making up his "Estimate No. 6" (Tr. p. 900) Olson made a further drop in his profit percentage (the prices at which he had ordered the material from Crane are shown by his order.) (Ex. 273, Tr. p. 944.)

This comparison shows this:

	Olson Price	Crane Price
Urinals	$81.10	$63.19
Lavatories for Toilet Rooms	48.70	37.95
Lavatories for Offices	34.77	27.10
Slop Sinks	49.70	38.50

An average profit of only about 25%. So that had the Court Court decided that the closets and

the material in Olson's shop and Godfrey's shop had been "furnished" within the meaning of the lien statutes, but that Olson was entitled to only a 25% profit, Olson would have been entitled to a lien of less than $1,000.00, and all of that material would have belonged to the receiver. And this gives Olson all the profit he is claiming on the material in his own shop and on the material and labor which he furnished, the cost price of which does not appear in the evidence. The following are the figures:

Crane lien (inclusive of the closets)	$20,416.80
25% profit	5,104.20
Godfrey valves	1,595.75
25% profit	398.44
In Olson's shop	5,875.60
Material furnished by Olson (Ex. 357)	1,173.99
Labor furnished by Olson (Ex. 357)	2,279.80
	$36,844.58
Credits	$31,472.64
	$ 5,371.94
Balance of Crane's claim for closets	$ 4,398.90
Claim	$ 973.04

In estimating Olson's damages by virtue of the breach of the contract the Court arrived at 15% profit as fair. Therefore, if the trial court had found that these materials had been "furnished" by Olson, and allowed a recovery on the cost price

plus 15%, Olson's lien would be for less than $2,000, and the rest of the creditors would have benefitted by this undelivered material which is probably worth $10,000.00

The following computation shows this:

Materials from Crane, inclusive of the closets as shown by Crane's lien	$20,416.80
Godfrey valves	1,595.75
	$22,012.55

Olson's "estimated" value of the material actually furnished by him was $1,173.99, and the value of the material at his shop, i. e., the pumps, racks, etc., as "estimated" by him was $5,875.60. These two items total $7,049.59. The evidence does not show what they actually cost, but assuming that these "estimated" values includes a 50% profit as he was charging on the other items, this profit would amount to $2,339.00, and the cost price would be less than $5,000.00. Adding $5,000.00 to the above total would make it $27,012.55. Adding 15% to this as profit, or $4,051.88, and also Olson's full "estimated" value of the labor actually furnished by him, (since we think he should be entitled to more than a 15% profit on the wages of the men employed by him) the following results:

Known cost prices of materials		$22,012.55
Estimated cost prices of materials furnished and on hand in his shop		5,000.00
15% profit on above items		4,051.88
Labor furnished		2,297.80
Total		$33,344.23
From which deduct:		
Cash paid Olson	$12,425.56	
Credit for old fixtures	1,000.00	
Crane lien as allowed (which excluded the closets)	16,047.08	
Costs allowed Crane Company	2,000.00	
Total		$31,472.64
Olson's claim		$ 1,871.59

Had the court determined on the trial that all of this material had been "furnished" within the meaning of the lien law, without any doubt the receiver could have gotten the closets from Crane Company because the court would have had to allow Crane's lien therefor, but what about the Godfrey valves? They did not belong to Olson, they were never in Olson's possession, they had never been paid for by Olson, and Godfrey was claiming no lien therefor. The Court had no power to force Godfrey to deliver them and the receiver could not have recovered them by suit, Olson's lien in this respect is manifestly for something that was not furnished.

Appellant, however, claims that he is entitled

to a lien for these undelivered materials even though they were never delivered anywhere to anyone because they were "specially constructed" for this building. This claim, even if that be the law, is not supported by the evidence.

There is not even any claim made *in the evidence* that the pumps, hose racks and radiator valves which are enumerated in appellant's brief at page 22 are special. In fact Olson says with reference to the valves (Tr. p. 906): "They could be used on any type of raditor but only where that particular system of heating is in use;—I mean the vacuum system of heating" and further on the same page, "The pumps were from Fairbanks Morse Company, the hose racks from the United States Rubber Company on A Street."

Of the urinals, lavatories and slop sinks contained in Estimate No. 6 for which he claims a lien of $12,000, although they have never even been delivered to him by Crane & Company, and are in the Crane Company warehouse—or were there —Olson says: "The toilet sets could be used any place where an architect would specify," (Tr. p. 902), also: "They are not of Crane Company make. They were made by the Pacific people in this case. We bought them from Crane Company but they were products of the Pacific Company, which manufactured all those goods." (Tr. p. 904.)

With reference to the closets mentioned in Esti-

mate No. 5, for which he claims a lien of $6,000.00, Olson says (Tr. p. 905), "with these fittings (the Hurlbut Fittings) and the other material which is in Crane Company's warehouse, we would have complete closets suitable for installation in any public building where they are specified."

All of this plumbing was shown and offered for sale in the Crane Company catalogue. There was evidence, however, that it was special because it is ordinarily made up upon order and is not ordinarily carried in stock, also because of the large quantities of the articles specified in this building; but this does not bring the material within the rule of a specially manufactured article, which requires that the article be such that it is unsuitable for other buildings of a similar character.

Appellant's "First Error"

In answer to the argument made under this head with reference to delivery, we refer the Court to our brief in the Washington Brick Lime & Sewer Pipe Company case for our views upon the law.

Upon the facts, Olson has never parted with title to these undelivered materials. This is shown most emphatically by the fact that after the appointment of the Receiver herein, he applied to the Court as the owner of the materials *upon the building site* and persuaded the Court to permit him to take from the receiver materials of the value of nearly five thousand dollars upon the theory that

he owned them. If he owned the materials delivered to the building, how can he claim that he does not own the material at his shop.

With reference to the closets, urinals, lavatories, etc., which were in Crane's warehouse—what assurance is there that they will ever be delivered to the receiver, if Olson is allowed a lien therefor? They did not belong to Olson, they belonged to Crane Company. Olson has never paid for them and Crane has never delivered them to Olson. Crane Company is apparently satisfied with the decree as rendered. Since the rendition of the decree, Crane Company have had the legal right to sell these articles and have had it in their power to do so, since they have been in their possession and are their property.

Appellant's "Second Error"

We are not particularly interested in the question raised by this assignment, because we believe we have shown the Court, even allowing Olson his full "estimated profit," instead of the building company being indebted to him, he is indebted to the building company.

At this point, however, it might be well to recall to the court's attention the fact that Olson's contract contained an express waiver of the right to file a lien, and to the elementary law that a contract rescinded must be rescinded in toto. It is

not the business of the court to make contracts for the parties. The Court has no legal right to force one contracting party to perform the covenants of the contract on his part to be performed, but at the same time to relieve the other party thereto from the necessity of performing his part of the contract. That would be for the court to make a contract for the parties, which they, themselves, did not make. We have discussed this question in our appeal brief pages 52 to 55 inclusive, to which we refer the Court.

Appellant's "Third Error"

We disagree with the statement that the trial Court assumed anything other than the true facts or omitted to consider the items of labor amounting to $2,200.00, or material amounting to $1,100.00 mentioned by appellant under this assignment.

It would certainly be inequitable for the Court to have allowed the appellant a lien for $3,000.00 for materials and labor furnished for which he had been more than paid; or to allow a lien for $3,000.00 when he had filed a lien for $41,000.00 and attempted to foreclose the same for material which he had not paid for, did not have and did not own; nor to allow this lien for $3,000.00 when his failure to pay Crane had caused the court to assess costs of $2,000.00 against the Building Company.

This evidence referred to (Mr. Herber, Tr. p. 965 et seq.) but emphasizes the injustice of appellant's claims. It shows that although the appellant had only furnished $3,400.00 of labor and material, exclusive of that furnished by Crane Company, for which Crane Company was allowed a lien, appellant had been paid $13,400.00 or— $10,000.00 too much.

Appellant's "Fifth Error"

We note the statement made on page 75 of Appellant's Brief under this assignment to the effect that "the supervisor and his deputy, and the Building Company's receiver, are one, the receiver fighting all creditors to assist the supervisor in getting from them the last possible scrap of property standing in the name of the sham corporation. The counsel for the supervisor and the building company are the same—paid out of the bank's assets. Therefore, there will be no resistance to the judgment complained of from that quarter."

If this is intended as invective to prejudice the Court it would probably be unworthy of notice except that the circumtsances are such, probably as to warrant an explanation. The State Court had appointed Mr. Haskell, receiver of the Building Company before the application was made in this case for the appointment of a receiver, upon his offer to serve without compensation; this was explained to the District Judge and Mr. Haskell objected to the appointment of a receiver in this

suit. The Court knew Mr. Haskell was the Deputy Supervisor and that Mr. Kelly was his attorney as such and that the Supervisor was asserting the mortgages to be superior to all the liens, but appointed Mr. Haskell, receiver in the District Court, upon his agreement to serve without compsenation. At that time it was suggested that Mr. Haskell as Receiver could not contest the mortgages asserted by the Supervisor, but the Court stated that the record in the case and his experience in the case convinced him that there were a sufficient number of attorneys contesting the claims of the Supervisor, and that there was no chance that any possible defense to the mortgages would be overlooked. We believe this Court will fully agree with this conclusion.

If the statement quoted above is made as argument, it is on a par with other arguments advanced by this appellant, notably that found on pages 53-54 of the brief wherein it is stated that the bank paid the Building Company $200,000.00 in cash and took capital stock of the Building Company, (of the par value of $200,000.00) *and thus fraudulently deprived* the Building Company of all of its assets.

By the same reasoning the bank also took the notes and mortgages of the Building Company, and only gave the Building Company in property and cash about $650,000.00 more. In all the Building Company got from the Bank nearly a millian dollars and the bank got several pieces

of paper. The Ben Olson Company got over $13,000 of this money for material and labor of the "estimated" value (with 50% profit added) of $3400 and yet it complains that it was thereby defrauded.

Again referring to the quotation we have above made from appellant's brief—we do not believe it to be the duty of the receiver to complain of a judgment which is favorable to the creditors. The decision of the trial court with regard to the Supervisors rights was an overwhelming victory for the lien claimants. The Court refused to follow counsel to the extent of holding that the assets of the Building Company were the assets of the Bank or that the creditors of the Building Company were the creditors of the bank. That is the result argued for by appellant upon the "identity of corporations" theory. The Court could not do this under any rule of law or equity. The unfortunate depositors in this defunct bank, deposited their money in the bank and not in the Building Company, granting that these contractors were equally unfortunate, they nevertheless made contracts in writing—not with the bank—but with the "SCANDINAVIAN AMERICAN BUILDING COMPANY"; these contracts by their terms recited that the "SCANDINAVIAN AMERICAN BUILDING COMPANY"—not the bank—owned the real property in question and was engaged in the erection of a building thereon, and these contractors had all accepted large sums of money from the

Building Company, as such. Equity would, therefore, compel the contractors to look to the assets of the corporation to which they extended credit, and would not permit them to take the position that they were entitled to a perference in the assets of the Building Company over the creditors of the bank and also to stand on an equal footing with the creditors of the bank in the assets of the bank. Equity would have required a marshalling of the assets of these two corporations, even had the court determined that they were one in law, and the creditors of the Building Company would not have been entitled to participate in the assets of the bank until the creditors of the bank had been paid in full, which would give the creditors of the Building Company nothing since the creditors of the bank will never be paid in full or anything like it.

Then too, from the standpoint of practice one defendant may not wage a private independent law suit with another defendant in a suit of this character. This appellant and the two or three other lien claimants who followed the lead of this appellant on this question of "identity of corporations" were in effect asking the Federal Court to compel the Supervisor of Banking to allow their claims as against the assets of the defunct bank. Aside from the question of the jurisdiction of the Federal Court to grant this relief, this would not be a joint right, but a separate independent right of

each contractor,—it would not be an equitable right but a legal right upon which the Supervisor would have a right to a trial by jury. So that the Court could not have granted that relief from a standpoint of practice.

Again, the contractors having filed their liens against the Scandinavian American Building Company and having sued the Building Company in this action, and having signed written contracts with the "SCANDINAVIAN AMERICAN BUILDING COMPANY" which recited that the Building Company was the owner of the real property in question and was engaged in the erection of a building thereon,—are thereby estopped from asserting that they dealt with the bank, and that the bank owned the property and was erecting the building.

Nor would the facts in this case have justified this decision. Appellants statements as to the facts is nearly as wild as its arguments. There are whole pages on the brief purporting to state the facts without any reference to the record as substantiating them, in which we have been unable to find our fair statement, supported by the evidence.

The evidence shows, we think, that O. S. Larson, the President and Manager of the Bank succeeded in hookwinking and deceiving the other directors of the bank, and in this that the directors of the bank were extremely negligent, but the bank cannot be held for the debt of the Building Company

merely because its directors carelessly permitted Larson, without their knowledge, to loot the bank in an effort to build this building with a corporation in which Larson personally owned all of the capital stock. The facts as shown by the record are as follows:

The bank owned lots 10 and 11, Block 1003 "Map of New Tacoma" in 1910, when it had a capital of $200,000.00. Its capital in June, 1919, was increased to $400,000.00 (Tr. p. 1236) and in July, 1919, (according to Larson) it determined to increase its capital to $1,000,000.00 (Tr. p. 1048) but its capital was not in fact increased until April, 1920, (Tr. p. 1036). So that the increase of capital stock had nothing whatever to do with the Building Company.

It is true that Larson stated that it July, 1919, and thereafter the bank contemplated the erection of a new building (Tr. p. 1040) but in this the written evidence overwhelmly disproves Larson's statement for on August 6th, 1919, Larson wrote the President of the bank that he had instructed attorneys to incorporate a corporation to be known as the "Eleventh Street Improvement Company or some other suitable name" which "will purchase the property from the bank and Drury, construct the building and operate it." And by August 24th he had arranged with Simpson, an Eastern Bond Broker, for a building loan of $900,000 which would net $810,000 and Simpson's communications with

Larson shows that this loan was to be made—not to the bank—but to "the building corporation" and Larson's letters to Simpson show that the only terms that the other directors of the bank would make, were that the bank should sell the lots "outright to the building corporation so that finally the only interest the bank would have in the property would be a lease on the banking room." (Ex. 199, Tr. p. 1052.) These facts do not justify the statement that the bank set up the Building Company as a screen behind which to escape liability or avoid criticism and they absolutely disprove the assertion that the bank intended to build the building; added to this, every director of the bank was told by Larson that he had the building financed in the East and that not one cent of the bank's money was to be used in the building. (Williamson, Tr. pp. 1116-18-19; Lindberg, 1126, 1128; Thompson, 1148; Sheldon, 1153; Lamborn 1172.) He also made the same statement to the Bank Commissioner of Washington. (Ex. 219, Tr. p. 1086.)

In fact when Larson had the Scandinavian American Building Company organized in November, 1919, it was understood that the building would be erected for $860,000 (Tr. p. 1040)—he had a "Commitment" from the Metropolitan Life Insurance Company to loan $600,000 on it and the agreement of the Scandinavian Amercian Bank of Seattle to take $150,000 of second mortgage

bonds (Ex. 202, Tr. p. 1058) and the assurance of Webber that he could get the contractors to take a portion of their final payments in second mortgage bonds (Tr. p. ...)

Although the Washington Statute provides that a duplicate copy of Articles of Incorporation shall be filed with the County Auditor, this is not a condition precedent to the de jure organization of a corporation—when the Articles are filed with the Secretary of State and he is paid a $25.00 fee for filing them and a $15.00 fee for the first years annual license fee—he issues to the corporation the authorization of the State of Washington to conduct its business, (R. & B. Code, Sec. 3709-3714) these fees were paid by the Building Company in November, 1919, (Ex. 352, Tr. p. 1246). So that when appellant states that the Building Company was not even a de facto corporation, he is attempting to over-rule the written certificate of the Secretary of the State of Washington which was introduced in evidence in this case.

Appellant contends that the minute book of the Building Company was carelessly kept and that there were no meetings of Stockholders or directors. This minute book was carelessly kept—but so are nine tenths of the corporate minute books of private corporations—and as for the stockholders meetings—Larson owned all the stock except four shares. But this not only does not show any fraudulent design on the part of the bank but is well

nigh conclusive of the contrary. If the board of directors of the bank were intending to perpetuate any fraud through the agency of the corporation, they were experienced enough and intelligent enough to have seen to it, that the records of this corporation would make good evidence in their favor. The facts show that this was Larson's corporation and nobody else paid any attention to it.

In order to impressively argue that the Building Company was doing business before it was legally incorporated, under its theory of the law—appellant states that on "December 10, 1919, Drury the Tailor, conveyed lot 10 to the Building Company." It was intended to State "November" 10th because that is the date of the deed—but this deed shows that the revenue stamp was cancelled thereon on February 9th, and that it was filed on February 9th (Ex. 352, Tr. p. 1251) and the books of the Building Company show that it was paid for on February 9th (Ex. 352, Tr. p. 1246.)

The statement is made that the McClintic-Marshall contract was made Feb. 6, 1919,—that is the date it bears—but the contract also states that it was made in Pittsburg, Pennsylvania on that date, and the evidence shows that both Drury and Sheldon, the officers that signed it for the Building Company, were in Tacoma at that time.

The Court will bear in mind that both Drury and Larson had personal pecuniary interests to

be subserved in this building operation. If Larson was able to borrow sufficient money on the security of the building as he undoubtedly thought he could, and then had the Building Company lease the Banking quarters to the bank at a rental which would insure that the building would pay enough to carry this loan, as he was figuring on doing (Tr. p....); he had $200,000 personal profit made. And Drury was canny enough to raise the price of his lot from $60,000, the price he had given Larson in August (Ex. ... Tr. p. ...) to $65,-000.00 in the following February. Although Larson and Drury got this $65,000 out of the bank, they did it in such way that it did not appear anywhere as a loan to the Building Company at that time, and in such way that Williamson, the attorney for the Bank and one of its directors, and the one man who appears to have been suspicious of this deal, did not know of it. This is conclusively shown by the fact that as soon as Williamson found out that Larson had lent the Building Company $25,000.00 he resigned as a director of the bank (Tr. pp. 1118-1119). It is significant also that instead of fighting Larson—Williamson resigned.

When this corporation was organized, Williamson, a director and the attorney, and Chilberg, the president and a director, of the bank, questioned Larson with reference to the payment for the capital stock of the Building Company, and Larson led them to believe that he had it placed somewhere.

(Tr. pp. 1109 and 1137.)

In February when these contracts were let and the bank conveyed the property to the Building Company, Larson still had—or thought he had —the finances so arranged that he could pay for the property and erect the building and have his $200,000 of stock as a profit. The building, according to Webber's plans was to cost $1,100,000, —he had arranged with Webber to reduce this $60,000 by eliminating marble (Tr. p. . . .) and his words "this one item alone" indicate that there were other contemplated reductions and he had the agreement of the Metropolitan, $600,000, and the assurance of Simpson that he had placed the second mortgage bond issue of $750,000 of which the bank was to get $350,000 for its property.

When it developed that Simpson did not have the second mortgage bond issue placed—he as president of the bank, in March and April lent to the Building Company $25,000, each month, (Tr. p. . . .) these loans were thereafter ratified by the directors—and it was then that Williamson resigned.

As early as June 5th Larson wrote the Metropolitan attempting to get that company to advance money on the $600,000 mortgage, and on June 11th they wrote refusing to make advances but suggesting that upon the strength of their commitment and mortgage Larson should be able to ar-

range to have the Bank loan the Building Company money for temporary use, (Ex. 214, Tr. p. 1080) and within a week from the time Larson got this letter, without the knowledge of any of the other directors of the Bank, and in the face of a positive, direct prohibition sent him by the bank commissioner on June 21, and on June 25, Larson gave the clerks in the bank a deposit slip which indicated that the Building Company had deposited $200,000.00 in cash, to which was attached a memo slip upon which Larson wrote "Debit—account No. 13—Stock and Securities. Payment in full stock subscription Scandinavian American Building Co., $200,000.00 Contra: Credit Scandinavian American Building Company. O. K., O. S. Larson." (Ex. 190, Tr. p. 1034.) The Court will notice this in nowise indicates whose subscription to the capital stock of the Building Company was being paid but Larson had the book-keeper of the Building Company show on the books of the Building Company that this deposit was made "by O. S. Larson" (Tr. p. 1111), and thereafter Larson gave the Clerks in the bank a check of the Scandinavian American Building Company in which this stock transaction is shown as a loan from the bank to the Building Company. (Ex. 235, Tr. p. 1120.)

This was the first dip that Larson made into the Bank's assets for the benefit of the Building Company, he knew that he could not show this on

the bank's books as a loan from the bank to himself, the Bank Commsisioner was already objecting to illegal loans and over-drafts showing on his account (Tr. p. . . .), and under our law it is made a criminal act for a director of a bank to borrow from the bank unless the loan is previously authorized by the board of directors in a meeting at which the borrowing director is not present. So that doubtless Larson made the record that he did so that no one could tell just what the transaction was without an explanation from him. There were no certificates of stock delivered to the bank at this time, as the appellant would have the Court believe, but the certificates of stock were not in fact even made out until after the bank was examined in December by the Bank examiners, and it was at their instance that the stock certificates in the Building Company were made out, endorsed and delivered to the bank, when they were dated back to June 25, to correspond with this loan. (Tr. pp. 1168 and 1165.)

The mere fact that Larson was able to hoodwink the other directors in this manner—or to cow them into submission to his will, if they really did know the facts of the transaction (although they all swear they did not know anything about the transaction, in fact) would not warrant the court in holding the bank and Building Company were one—or that the building scheme was a fraudulent transaction on the part of the bank as a corporate entity. Particularly is this true in view

of the insolvency of the bank and the fact that the equities of the creditors of the bank are equal at least to the equities of the creditors of the Building Company. In this connection the Court will remember that the Supervisor does not represent the Bank or the Stockholders of the bank, but only the depositors.

But even aside from this, how can it be said that the looting of the bank by even its board of directors, who owned at all times less than 20% of the stock of the bank, would make the bank as a corporate entity liable for the debts of another corporate entity? These men did not have the power, express or implied, to give the banks assets away. Under the statutes of this state a bank cannot invest more than 20% of its capital and surplus in real estate, when these men were elected directors they did not thereby become invested with the implied power to violate this law and to invest a sum equal to the entire capital stock of the bank, as thereafter increased, in the erection of a building. The directors had no authority to appoint the Building Company as an agent of the bank for the purpose of erecting this building—the Court could not rule that they could indirectly do that which they could not do directly.

Appellant says the bank continued to carry the real estate upon its reports as an asset, True, it did. Perhaps this was wrong, but it could not have the effect of nullifying a deed theretofore made, executed, delivered and recorded. There is, too, we

submit, a reasonable explanation of this. The bank deeded this property to the Building Company upon the agreement of the Building Company to erect the building, reserve space in it for the bank, and to deliver to the bank before June 10, 1920, second mortgage bonds of the par value of $350,000. The Building Company never delivered these bonds, so that there was nothing among the assets of the bank to off-set the real property which they had been showing on their reports, and the book-keeper not having any directions from anyone with respect to this matter, made no change in his entries (Tr. p. 1122).

Appellant also states that the Supervisor claims this stock as an asset in his hands. The records of the bank show that this stock is property pledged to the bank and that the bank had lent the Building Company nearly a million dollars, it seems to us that it is natural that he would hold the stock under those circumstances. There was no identity in the stockholders of the two corporations. The purposes for which the two corporations were organized are entirely distinct—the Building Company could not do a banking business and the bank could not own and improve real property. The Building Company was not the agent of the bank in any sense of the word, and it would have been on ultra vires and illegal act for the bank to have attempted to make the Building Company its agent. If there was any fraud, it was not the fraud of the bank, which was itself defrauded.

Appellant argues that the bank was the agent of the Building Company, merely, we presume, because the cases cited by him use that term. In those cases, however, there was a real identity—the stockholders in both corporation were the same, and in each case there was either an intention to defraud or the circumstances were such that it would work a fraud for the court not to put the assets of both into one fund for the benefit of the creditors of both. But all of these circumstances are absent in this case. The Building Company, as we see it, was Larson, and to argue, as the appellant does, that the Bank could control the Building Company, or Larson, it seems to us, is entirely disproved by the recoord. The criminal statutes of this State did not control Larson, nor did the express and positive commands of the Bank Commissioner deter him,—he was beyond control, but neither the Bank nor its directors nor its stockholders could dictate the policy of the Building Company or in any wise legally control its actions. When the Bank passed the title to this real property over to the Building Company, the bank thereby lost all legal control over the real property except as the contract may have given it a right to insist on the fulfillment of the terms thereof, and if, in fact, it lost control over the land it certainly had no control over the Company.

Respectfully submitted,

KELLY & MACMAHON,

Attorneys for Receiver.